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737-180—64——1

1887 [File endorsement omitted]

In the United States Court of Appeals for the Fourth Circuit

No. 8790

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition To Review and Set Aside Order of the National Labor Relations Board—Filed October 18, 1962

To The Honorable, The JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

Darlington Manufacturing Company and Deering Milliken, Inc. (hereinafter collectively referred to as "Petitioners") petition this Honorable Court to review and set aside a final Order, dated October 18, 1962, (hereinafter "the Order"), made and entered by respondent National Labor Relations Board in a proceeding entitled "In the Matter of Darlington Manufacturing Company, Roger Milliken, Deering, Milliken & Co., Inc. and Textile Workers Union of America, AFL–CIO, Case No. 11–CA–1071," by which Petitioners are aggrieved and their interests are adversely affected.

1888 In support thereof, Petitioners respectfully show to the Court as follows:

I

JURISDICTION AND VENUE

1. This petition is filed pursuant to section 10(f) of the National Labor Relations Act, as amended (hereinafter "the Act"), 29 USC § 160(f), and in accordance with Rule 27 of the Rules of this Court.

2. As hereinafter appears, the unfair Labor practice or practices in which Petitioners have been found by respondent National Labor Relations Board (hereinafter "the Board") to have engaged, by the terms of the Order, occurred in or about the plant and place of business of Petitioner Darlington Manufacturing Company, at Darlington, South Carolina, located in this judicial circuit.

3. Both Petitioners transact business within this judicial circuit.

II

Nature of the Proceedings as to Which Review Is Sought

4. The proceedings resulting in the Order were initiated on October 16, 1956, by the filing of charges against Petitioner Darlington Manufacturing Company by Textile Workers Union of America (hereinafter "the Union"). On December 4, 1956, respondent's Regional Director for the Eleventh Region issued a complaint charging that Petitioner Darlington Manufacturing Company had violated subsections (1), (3) and (5) of section 8(a) of the National Labor Relations Act, as amended.

1889 5. Petitioner Darlington Manufacturing Company, a South Carolina corporation, was formerly engaged in the business of manufacturing cotton textiles at its mill located in Darlington, South Carolina. Following a representation election among the employees of Darlington pursuant to an order of the Board, in which a narrow majority of the employees voting designated the Textile Workers Union of America as their collective bargaining representative, the stockholders of Darlington Manufacturing Company, on October 17, 1956, voted to dissolve the corporation, and thereafter the company ceased all business activity, sold all of its property and assets, and commenced distribution of its net assets to its stockholders.

6. Hearings on the original charge were held before Lloyd Buchanan, Esq., a Trial Examiner of the Board, in January and February of 1957, after which the Trial Examiner issued an Intermediate Report on April 30, 1957, in which he:

(a) Found that Darlington had violated certain provisions of the Act, but

(b) Rejected the demand of General Counsel for the Board that back pay be awarded to former employees of Darlington, and the demand of the Union, the charging party, that Darlington be required to resume operations as a textile mill.

7. The proceedings subsequent to the Intermediate Report of April 30, 1957 (the first of four such Reports which have been issued in the case by the same Trial Examiner) are set forth in the opinion of this Court, dated October 13, 1961, in a case entitled "Deering Milliken, Inc. v. Reed Johnston, as Regional Director of the National Labor Re-

1890 lations Board", such decision being reported at 295 F. 2d

856, and reference is hereby made to such decision for a recital in summary form of the proceedings before the Board including the Order of the Board dated April 15, 1961, which remanded Case No. 11–CA–1071 to its Regional Director for the purpose of arranging further hearings.

8. Pursuant to the mandate of this Court, and the order of the United States District Court for the Middle District of North Carolina (Wyche, D.J., sitting by designation) dated January 18, 1962, a brief hearing was held in Case No. 11–CA–1071 on February 5, 1962, in Winston-Salem, North Carolina, limited to the issue fixed by this Court in its mandate. On March 23, 1962, the Trial Examiner issued his Second Supplemental Intermediate Report and Recommended Order (the fourth Intermediate Report issued by him) in this case, in which he reiterated earlier findings that no basis existed in this record for a determination of liability under the Act on the part of any company other than Darlington Manufacturing Company, and again recommended the dismissal of the complaint against Deering, Milliken & Co., Inc.

9. On March 23, 1962, the case was once again ordered transferred to the Board in Washington, D.C., where it remained ters as accounting procedures, vacation plans, and incentive pending until the issuance of the Order sought to be reviewed by the instant proceeding.

III

Ground on Which Relief Is Sought

10. The Order adopts in part, but in large measure rejects, the findings and recommendations of Trial Examiner Lloyd Buchanan in three of his Intermediate Reports filed during the course of this case. (The Intermediate Report
*1891 not affected by the Order was concerned with the amended complaint issued against Roger Milliken in Case No. 11–CA–1071, and recommended dismissal of such complaint, a recommendation thereafter adopted by the Board.) In pertinent part, the Order determines and provides that:

(a) Deering, Milliken & Co., Inc., respondent in Case No. 11–CA–1071 (the predecessor of Petitioner Deering Milliken, Inc.), so dominated and controlled the operations and policies, especially the labor relations policies, of Petitioner Darlington Manufacturing Company (and certain other related corpora-

tions), as to constitute a "single employer" with Petitioner Darlington Manufacturing Company;

(b) The termination of the business activities of Petitioner Darlington Manufacturing Company and its dissolution by vote of its stockholders constituted an unfair labor practice on the part of such company under various provisions of the Act;

(c) Affirmative relief, including an award of back pay to former employees of Darlington Manufacturing Company, and a direction that they be offered employment at the textile mills of other corporations not parties to this proceeding, was found to be available and was granted against both Petitioners.

11. The grounds upon which Petitioners rely for the relief hereinafter requested are as follows, *inter alia*:

(a) Certain material findings of fact upon which the Board has predicated the Order are erroneous because they are contrary to the evidence in the record considered as a whole
1892 and are not supported by substantial evidence in the record considered as a whole. Specifically, but without limitation, the Board's decision is in error in holding that:

(1) The decision of the directors and stockholders of Darlington Manufacturing Company to dissolve the corporation was made without economic justification, and was solely in response to the Union's victory in the representation election;

(2) Deering, Milliken & Co., Inc. controlled and participated in the operations of Darlington Manufacturing Company, and in the formulation and execution of its policies particularly those with respect to labor relations.

(b) The conclusions of law upon which the Order is based are either unsupported by findings of fact or predicated upon erroneous findings of fact not supported by susbstantial evidence. Specifically, but without limitation, the Board has erred in its conclusions of law that:

(1) Deering, Milliken & Co., Inc. occupied "single employer" status with Darlington Manufacturing Company;

(2) Darlington Manufacturing Company did not have the right to go out of business and terminate the services of its

employees without liability under the provisions of the Act;

(3) The relief granted, including the award of back pay and an offer of employment at other textile mills, is remedial, and lies within the powers granted to the Board by the Act.

1893 12. The Order is illegal and void in its entirety, and is contrary to law and an abuse of the discretion of the Board under the Act, and respondent Board has erred:

(a) in its failing to recognize, approve and grant Petitioners' exceptions to the first Intermediate Report and recommended Order of the Trial Examiner; and,

(b) in its granting of certain of the exceptions of the Union and of the General Counsel for the Board to the other Intermediate Reports and recommended Orders in the proceeding,

copies of all of which will be part of the record to be filed herein.

IV

Relief

13. Petitioners pray that:

(a) The Board's Decision and Order be reviewed by this Court, and said Order be set aside, vacated and annulled in its entirety, and the Board be ordered to dismiss the complaint against Darlington Manufacturing Company and Deering, Milliken & Co., Inc., predecessor of Petitioner Deering Milliken, Inc.,

(b) If the preceding prayer for relief is denied, then, in that event, that this Court modify said Decision and Order of the Board, by setting aside, vacating and annulling those provisions which are erroneous and unlawful;

1894 (c) A copy hereof be forthwith served according to law upon the Board and that the Board be required in conformity with law to certify to this Court a transcript of the record in the proceedings wherein said Order was entered;

(d) This Court specifically order that the filing of this Petition shall operate as a stay of the Order of the Board;

(e) This Court exercise its jurisdiction and grant to Petitioners such other and further relief in the premises as the rights

and equities of the cause may require and may seem just and proper to this Court.

Dated: October 18, 1962.

(S) AUBREY R. BOWLES, Jr.,
(S) AUBREY R. BOWLES, III,

Bowles, Boyd & Herod, 901 Mutual Building, Richmond 19, Virginia, Attorneys for Petitioners.

Of Counsel:

PRICE & POAG,
Lawyers Building, Greenville, South Carolina, Attorneys for Petitioner, Darlington Manufacturing Company.

TOWNLEY, UPDIKE, CARTER & RODGERS,
220 East 42nd Street, New York 17, New York, Attorneys for Petitioner, Deering, Milliken, Inc.

1895 In the United States Court of Appeals for the Fourth Circuit

No. 8790

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Order Allowing Intervention of Textile Workers Union, etc.—January 23, 1963

Upon the motion of Textile Workers Union of America, AFL–CIO, and no opposition appearing thereto,

It is ordered that leave be granted to the Textile Workers Union of America, AFL–CIO to intervene as a party in the above-entitled case.

January 23, 1963.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

1896 [File endorsement omitted]

In the United States Court of Appeals for the Fourth Circuit

No. 8790

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Answer of the National Labor Relations Board to Petition for Review of its Order and Cross-Petition for Enforcement of Said Order—Filed January 25, 1963

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*, as amended by 73 Stat. 519), files this Answer to the Petition for Review filed in this proceeding:

1. The Board admits the allegations in Part I of the Petition for Review concerning the jurisdiction of the Court.

2. With respect to the allegations contained in paragraphs numbered 4 through 10 of the Petition for Review, the Board prays reference to the certified transcript of record for a full and exact statement of the proceedings before the Board, of the pleadings and evidence, of the Board's findings of fact, conclusions of law, and order, and of all other proceedings had in this matter.

3. The Board denies each and every allegation of error contained in the Petition for Review.

4. Further answering, the Board avers that the proceedings before it, and the findings of fact, conclusions of law, and order of the Board were and are in all respects proper under the Act, and pursuant to Section 10(e) of the Act, respectfully petitions this Court to enforce this order.

1897 5. Pursuant to section 10 (e) and (f) of the Act and Rule 27(7) of this Court, the Board will file with this Court a certified list of all documents, transcripts of testimony, exhibits, and other material comprising the entire record of the proceedings before the Board.

WHEREFORE, the Board prays that the Court deny the Petition for Review and enter a decree enforcing the Board's order in full.

(S) MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D.C., this day of Jan. 23, 1963.

1898 United States Court of Appeals for the Fourth Circuit

No. 8790

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., PETITIONERS

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, INTERVENOR

ON PETITION TO REVIEW AND SET ASIDE ORDER OF THE NATIONAL LABOR RELATIONS BOARD

No. 8861

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

1899 DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., INTERVENORS

ON PETITION TO REVIEW AND MODIFY A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

No. 8906

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

DEERING MILLIKEN AND COMPANY, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued June 13, 1963.

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN, and BELL, Circuit Judges, sitting en banc.

Thornton H. Brooks (McLenon, Brim, Holderness & Brooks on brief) for Darlington Manufacturing Company; *Stuart N.*

Updike and John R. Schoemer, Jr., (*Townley, Updike, Carter & Rodgers on brief*) for Deering Milliken, Inc., and Deering, Milliken and Company, Inc.; *Nancy M. Sherman, Attorney, National Labor Relations Board, Arnold Ordman, General Counsel;* (*Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and James C. Paras, Attorney, National Labor Relations Board, on brief*) for National Relations Board, and *Benjamin Wyle* (*Patricia Eames on brief*) for Textile Workers Union of America, AFL–CIO.

Opinion—November 15, 1963

ALBERT V. BRYAN, *Circuit Judge:*

The National Labor Relations Board in these consolidated cases has made these pivotal decisions:[1]

1. Darlington Manufacturing Company committed an unfair labor practice under the National Labor Relations Act, Section 8(a)(3)[2]—forbidding discrimination in regard to tenure of employment—by closing and liquidating its only plant, and discharging its employees, in 1956 because of the election of Textile Workers Union of America, AFL–CIO as bargaining representative for the employees;

2. Darlington must pay all of such discharged employees their wages, less current net earnings, "until the discharged employees are able to obtain substantially equivalent employment" or until they are put on a preferential hiring list by Deering Milliken, Inc.; and

1901 3. Deering Milliken, Inc. and its affiliates are liable for the payment of these wages on the ground that Darlington, with others, was such an affiliate of Milliken and together they constituted a single employer.

In petition No. 8790 Darlington and Milliken seek to vacate these Board orders. In No. 8861 the Union, which was the charging party before the Board, prays that the orders be enlarged to require also the reopening of the Darlington plant with reinstatement of the employees, and that Roger Milliken, president of both Darlington and Milliken, notwithstanding the contrary decision of the Board, be held personally liable to satisfy the orders. In No. 8906 the Board seeks enforcement against Milliken of the Darlington liabilities.

[1] 139 NLRB No. 23, decided October 18, 1962.

[2] 29 U.S.C. § 158(a)(3)

As these actions have common issues they have been argued and considered together. We decline to enforce these orders of the Board against Darlington and Milliken.

Darlington, chartered under the laws of South Carolina, operated a print cloth mill there, manufacturing and selling cotton greige goods. It had no other plant. In 1937 Darlington went through a Section 77B bankruptcy proceeding, 11 U.S.C. § 207 (1937 ed.). Milliken, then known as Deering Milliken & Co., Inc., as one of the largest creditors, received in payment of its debt about 41% of Darlington's common stock. When Darlington was liquidated in 1956, as previously mentioned, there were outstanding 150,000 shares of common stock owned as follows:

Deering Milliken & Co., Inc.	41.4%
Cotwool Manufacturing Corp.	18.3
Roger Milliken and members of his immediate family	6.4
1902 Directors and employees of Deering Milliken & Co.	2.9
Outsiders or non-Milliken family or interests (about 100 stockholders living in South Carolina, 50 in New York, and more than 50 scattered over the United States)	31.0
	100.0%

In March 1956 the Union commenced a campaign to organize the Darlington employees and to become their bargaining representative. An election conducted under the direction of the Board was called for September 6, 1956. The Union won, 258 to 252.

On September 12 Darlington filed objection to the election. A conference was requested on the same day by the Union to discuss a collective bargaining agreement. The request was refused by Darlington on the ground the election protest had not been decided and the Union had not been certified.

Also on September 12, the Board of Directors met, with all of them present. Following a brief discussion of the business status of Darlington, they resolved to recommend to the stockholders the liquidation and dissolution of the corporation. A meeting of the stockholders to act upon the resolution was called for October 17. Employees of Darlington were at once told of the recommendation. While no new ones were accepted, the plant continued to fill the orders then in hand. The objection of Darlington to the election was overruled on October 8, and the Union shortly certified as the bargaining representative.

1903 With the stockholders on October 17 adopting the recommendation of the Board of Directors by a vote of 134,911 and shares 3,774, the officers proceeded with the liquidation. Discharge of employees occurred over a span of about six weeks: from 510 employees on October 13, the payroll dropped to 460 on October 20, to 345 on October 27 and to none when the plant closed on November 24. The machinery and equipment were sold at auction on December 12 and 13, 1956. Since that time Darlington has not operated any plant in South Carolina or elsewhere[3].

Deering Milliken & Co., Inc.'s capital stock was owned in a majority amount by the members of the Milliken family. In addition they were the major (but by no means the only) shareholders in Darlington and in certain other textile corporations. The latter are the corporations referred to by the Board and in this opinion—somewhat imprecisely—as "affiliated corporations" of Milliken. Prior to 1960 Deering Milliken & Co., Inc. was not a manufactory. It was the exclusive sales representative of the producing corporations controlled by the Milliken family.

In June 1960 Deering Milliken & Co., Inc. was merged into the Cotwool Manufacturing Corporation, and the latter's name then changed to Deering Milliken, Inc., herein known as Milliken. A majority of its stock was owned by the Milliken family. After the merger Milliken carried on the textile manufacturing formerly pursued by Cotwool.

1904 The finding of the Board—that the decision to close the mill was an unfair labor practice under § 8(a)(3)—was spelled out in this way:

> "Darlington discriminated in regard to its employees' tenure of employment by closing its plant—thereby discharged the employees—and, because the plant closing was the direct result of the employees' selection of the Charging Union as their collective bargaining representative, Darlington's retaliation against the employees for their activities in behalf of the Union discouraged the employees' continued membership in the Union."

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[3] A concise history of the proceedings in this case appears in Judge Haynsworth's opinion for this Court in Deering Milliken, Inc. v. Johnston, 295 F 2d 856 (1961).

Abridged and as pertinent here the terms of § 8(a)(3) are these:

> "It shall be an unfair labor practice for an employer—by discrimination in regard to hire or tenure of employment or any term or condition if employment to encourage or discourage membership in any labor organization."

In this determination the Board acknowledged, as the Trial Examiner had found, that there were economic considerations sufficient in themselves to support the decision by Darlington to terminate operations. However, both the Examiner and the Board concluded that "the decision to close the mill was not a fact based on economic factors, and that, but for the Union's election victory, that decision would not then have been made."

Upon this premise the Board declared all the closure discharges to be unlawful, justifying the usual remedy of
1905 reinstatement and reimbursement for loss of pay. But with the shutdown complete and permanent reinstatement not achievable, the relief was necessarily directed primarily to restitution of wages. The monetary redress was awarded by the Board as follows:

> "[W]e shall therefore order the Respondent, Darlington, to provide back pay *until the discharged employees are able to obtain substantially equivalent employment*". [Accent added.]

Further, the Board overruling the Trial Examiner found that "Darlington occupied a single employer status with Deering Milliken and its affiliated corporations". On this basis Milliken and its affiliates were declared "liable for back pay to the same extent as we have heretofore directed with respect to Darlington" and were ordered to place the discharged employees on a preferred hiring list. Additionally, Milliken was commanded to offer employment to these discharged workers in its other mills in South Carolina or nearby States, without prejudice to their seniority and other privileges.

All of these orders were qualified by the proviso that if no work was available at the Milliken mills, then the accumulation of back pay would be tolled as and when the dischargees were put upon Milliken's preferential hiring list.

I. Our opinion is that the decision to close the plant was not an unfair labor practice. In this we accept the findings

of fact made by the Board. While, as just observed, the evidence discloses substantial economic reasons warranting the determination to close the plant without reference to the entry of the Union into the plant, we accede arguendo to the contention of the Board that these reasons were not acted upon. Even if they were, however, we shall assume, again arguendo, with the Board that if unionization also played a part in the resolve to close the plant, then the contribution of this factor may be considered as responsible for the cessation.

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To go out of business in toto, or to discontinue it in part, permanently at any time, we think was Darlington's absolute prerogative. The fundamental purpose of the National Labor Relations Act is to preserve and protect the rights of both industry and labor so long as they are in the relationship of employer and employee. But the statute's scope does not exceed that province. It does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of any employment contract have been met. Such withdrawal, alone and of itself does not create any obligation of either the employer or the employee to the other under the Act. *Cf.* Dissenting opinion of Board Member Rodgers in the present case. If a cessation of business is adopted to avoid labor relations, the proprietor pays the price of it: permanent dissolution of his business, in whole or in part. A statute authorizing an order forcing the continued pursuit of operations in these circumstances would be of doubtful validity. Consider the consequences of an attempt to punish as contempt a violation of such an order, and its fatal infirmity is revealed: the proprietor would be jailed or otherwise penalized for not reopening a demised business reinstating employees.

Of course, the right of discontinuance which we here uphold, means an actual, unfeigned and permanent end of operations—not a removal, nor subcontract, nor a change merely in the form of the corporate entity. No ruse or subterfuge is suggested here. Darlington's was an absolute desistence, not a temporary intermission as apparently was contemplated in NLRB v. Norma Mining Corp., 206 F. 2d 38 (4 Cir. 1953). There was no provisional lockout, the mill was not transplanted elsewhere, and its sale was concededly entire,

1907

bona fide and irrevocable. The Trial Examiner demonstrated beyond debate that Darlington was not a "run-away" plant—that is, a plant having another existence in another form—finding that Darlington was not hidden among the other Milliken corporations. No disagreement with this finding was, or on substantial evidence could have been, expressed by the Board.

"There is no decided case", the Board candidly states, "directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive". While a number of the decisions on the point mention the presence of a legitimate economic reason in connection with the right to close, an analysis of them discloses that they do not declare the existence of such a reason to be indispensable to the validity of the closing. See, *e.g.*, NLRB v. Preston Feed Corp., 309 F. 2d 346, 352 (4 Cir. 1962); NLRB v. New England Web, Inc., 309 F. 2d 696, 700 (1 Cir. 1962); NLRB v. Rapid Bindery, Inc., 293 F. 2d 170, 175 (2 Cir. 1961); Union Drawn Steel Co. v. NLRB, 109 F. 2d 587, 592 (3 Cir. 1940). Nor are they precedents for the proposition that an owner or operator cannot go out of business at his option if the closure is intended to be, and is in truth, absolute and permanent. These authorities, we think, support the view that if the termination is without intent to resume the business elsewhere—as a runaway—the power to close, even if spurred by unionization, is not precluded by the Act.

1908 The right is implicitly recognized in Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942), with Justice Jackson saying, "Whether there was a *bona fide* discontinuance and a true change of ownership—*which would terminate the duty of reinstatement*" was a question of fact determinable by the Board or the Court on contempt proceedings. [Accent added.] Bona fides does not mean exclusively an economic ground, but as well that the termination was, as here, not merely a gesture but an actuality.

Lower courts have long given explicit sanction to the right of discontinuance. Over 20 years ago the Fifth Circuit said in NLRB v. Tupelo Garment Co., 122 F. 2d 603, 606 (5 Cir. 1941):

> "The stockholders of Tupelo Garment Co. [the employer] had the absolute right to dissolve their corporation and the Board was without authority to prevent this."

Recently, the Sixth Circuit put it this way in NLRB v. R. C. Mahon Co., 269 F. 2d 44, 47 (6 Cir. 1959):

> "We find nothing in the National Labor Relations Act which forbids a company, in line with its plans for operation, to eliminate some some division of its work. As held in National Labor Relations Board v. Adkins Transfer Company, Inc., supra, [226 F. 2d 324] an employer faced with the practical choice, either of paying enhanced wage rates demanded by a union or of discontinuing a department of its business, is entitled to discontinue."

1909 Other courts have spoken in like manner and as emphatically, *e.g.*, NLRB v. New England Web, Inc., *supra*, 309 F. 2d 696, 700; Jays Foods, Inc. v. NLRB, 292 F. 2d 317, 320 (7 Cir. 1961); NLRB v. New Madrid Mfg. Co., 215 F. 2d 908, 914 (8 Cir. 1954); NLRB v. Caroline Mills, Inc., 167 F. 2d 212, 214 (5 Cir. 1948); Atlas Underwear Co. v. NLRB, 116 F. 2d 1020, 1023 (6 Cir. 1941).

To be sure, there are decisions adjudging the employer liable even upon an absolute disposition of all or a part of the business equipment: NLRB v. Kelly & Picerne, Inc., 298 F. 2d 895 (1 Cir. 1962); NLRB v. Missouri Transit Co., 250 F. 2d 261 (8 Cir. 1957); NLRB v. Bank of America, 130 F. 2d 624 (9 Cir.), *cert. denied*, 318 U.S. 791 (1942). Upon examination, however, it will be observed that these cases did not involve the extinguishment altogether of the business and the end of further participation by the employer in his former sphere. The predominant element of the principle we maintain is that the business is no longer extant and the owner has forfeited the penalty for withdrawing, that is, he has foregone the privilege of further pursuit of his business.

II. The doctrine of single employer, heretofore noted, was used by the Board to project Darlington's liability, as determined by the Board, upon Milliken. See NLRB v. Gibraltar Industries, Inc., 307 F. 2d 428, 431 (4 Cir. 1962), *cert. denied*, 372 U.S. 911 (1963); NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960). Our decision that Darlington is without liability, of course, bars such expansion of responsibility. Furthermore, even if Darlington was a division of Milliken, the transfer of Darlington's liability to Milliken upon the single employer principle is precluded because, as we have stated, a part,

1910 like the whole, of a business may be abolished when the extinction is consummated in circumstances like the present.

III. In its petition the Union asked us to enlarge the Board's order to include Roger Milliken individually in the orders of restoration of wages entered by the Board. This prayer like the further prayer of the Union that Darlington be required to reopen its plant is, obviously, denied by our acquittal of Darlington of liability.

The Board sustained the Trial Examiner in finding that Darlington had violated § 8(a)(1) in pre- and post-election statements and urging a repudiation of the Union. Likewise § 8(a)(5)—wherein refusal to bargain is made an unfair practice—was found contravened by Darlington. Remedies for these offenses are not now available as Darlington is no longer alive.

Power to command an employer to stay in business indefinitely, or assess him with damages for permanently going out of business, is not a National Labor Relations Board prerogative. Assumed by the Board in these cases, it is denied here.

Enforcement of Orders Denied.

1911 J. SPENCER BELL, Circuit Judge, with whom SOBELOFF, Chief Judge, concurs, dissenting:

If I read the majority opinion correctly it stands for the proposition that an employer may cease business in whole or in part for any reason, including anti-union bias, so long as such cessation is actual, unfeigned and permanent. It also holds that having ceased business and thereby terminated the employer-employee relationship, an employer may not be held liable under the National Labor Relations Act for any violations committed prior to his cessation of business. Since, in the opinion of the majority, an employer may cease business in part for any reason, including anti-union bias, they do not reach the question presented by the Board's finding that Deering Milliken [1] constituted a single employer of which Darlington was a part.

[1] Throughout this opinion Deering Milliken is used to refer to the entire complex of 27 manufacturing corporations and the affiliated service corporations unless it is clear from the context that the reference is to the factoring and sales agency, Deering Milliken and Company, Inc., later merged into Cotwool Manufacturing Corp. and then called Deering Milliken, Inc.

In my opinion the question presented to this court is whether an employer commits an unfair labor practice when he closes down a part of his business in order to discourage the practice and procedure of collective bargaining and to retaliate against his employees for exercising their freedom of self organization under the National Labor Relations Act. Not only does such conduct violate the basic policies embodied in the Act; it is literally within the proscription of Section 8(a)(3). Furthermore, it has been held to be an unfair labor practice by
1912 prior decisions of this and other Circuits, and I am unable to read the cases cited by the majority in support of its opinion as holding to the contrary.

Single Employer Status

The Board found that there was a sufficient degree of common ownership and control of labor relations and operations among Darlington, Deering Milliken, and its affiliated corporations to hold that these entities were in reality a single employer under the National Labor Relations Act.

As this court held in NLRB v. Gibraltar Industries, Inc., 307 F. 2d 428, 431 (4 Cir. 1962), cert. denied, 372 U.S. 911 (1963), a Board determination that two or more economic entities constitute a single employer is entitled to judicial approval if "there is substantial evidence in the record to support the Board's conclusion and order". The court in review, moreover, may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo". Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). I am convinced, upon review of the record as a whole, that there was an abundance of evidence to support the Board's position that Darlington, Deering Milliken and its affiliates constituted a single employer for purposes of the Act.

The record reveals that Darlington at the time when it ceased operations was one of seventeen corporations in the Deering Milliken complex owning and operating twenty-seven manufacturing plants scattered throughout the Eastern Seaboard. Deering Milliken performed the dual function
1913 of selling goods produced by each of these manufac-

turing corporations and factoring their accounts receivable [5].

The head of Deering Milliken's Tax Department, C. W. Kable, Jr., was an officer of each of the seventeen manufacturing corporations. His Department prepared all federal and state tax returns of the manufacturing corporations and advised them on a wide variety of tax benefits to be derived through following the Department's suggestions in such matters as accounting procedures, vacation plans, and incentive compensation contracts for supervisors. The Tax Department also advised the various manufacturing corporations in the proper drafting of minutes of directors' and stockholders' meetings.

The Deering Milliken Insurance Department handled all insurance for the various plants. The manufacturing corporations purchased standard forms of insurance through the Insurance Department, with policies running to each of them. Fire insurance and workmen's compensation insurance, however, were purchased under a policy covering all the plants. Significantly, Deering Milliken paid premiums on an executive air insurance policy covering both Deering Milliken executives and key manufacturing personnel, along with executives of Deering Milliken Service Corporation and Deering Milliken Research Corporation.

The Deering Milliken Service Corporation, a wholly owned subsidiary of the seventeen manufacturing corporations, was organized in 1951 for the stated purpose of providing 1914 "essential services to organizations in the textile industry at the lowest possible cost". These services were restricted, almost exclusively, to those corporations in the Deering Milliken chain. Various departments of Deering Milliken Service purchased all machinery, equipment, and cotton for the manufacturing plants. Research was conducted in the area of product improvement and studies were regularly made in connection with production problems common to several or all of the plants. Based on its findings, Deering Milliken Service made recommendations to the various manufacturing corporations with a view toward obtaining maximum

[5] Each mill corporation was charged a fee for services rendered. The service charges made were substantially less than those which would have been made by independent selling and factoring agents. Also of importance is the fact that Deering Milliken had no other non-Milliken affiliated mills as clients.

efficiency from raw materials, equipment, and personnel. These recommendations directly affected the work loads and work speeds in the manufacturing plants, a critical area of labor relations.

The Placement Department of Deering Milliken Service conducted an annual recruitment program among college students, seeking to attract supervisory personnel for each of the manufacturing corporations. The prospective management and technical trainees were encouraged to look upon the organization as a whole. The record reveals that after hiring there was considerable movement of supervisory personnel between corporations. For instance, approximately half of the supervisors who worked at Darlington between 1951 and 1956 were hired from other Deering Milliken corporations, as was Darlington's Mill Treasurer, James M. Oeland.

Supplementing the services carried on by Deering Milliken Service, Deering Milliken Research Corporation conducted surveys and inspections in the manufacturing plants toward the goal of standardizing a preventative maintenance system common to all of the mills.

1915 The record, in sum, reveals that the Deering Milliken complex was a thoroughly integrated, monolithic enterprise. The participating mills were able to call upon various service arms of the enterprise to effect optimum employment of men, material, and machinery. Sales were made and factored through a common agency. Management personnel was jointly recruited and transfers freely made from one corporation to another. Moreover, descriptive literature and advertising published by Deering Milliken on behalf of the manufacturing corporations repeatedly emphasized the generic brand name of Milliken rather than individual corporate brand names.

After the alleged unfair labor practices which formed the subject matter of the present controversy, Deering Milliken & Co., Inc., in 1960 merged into the Cotwool Manufacturing Corp. to form Deering Milliken, Inc., and several of Cotwool's former subsidiaries were then liquidated into Deering Milliken, Inc. I find the merger of more than passing interest. To me it indicates that the separate corporate entities of the Deering Milliken complex were largely paper corporations which could be shifted and changed at the convenience of the Milliken family. This is highlighted by the fact that the various liqui-

dations and mergers had no substantial effect on the actual functioning of the various entities within the Deering Milliken enterprise. Minot Milliken, Vice President of Deering Milliken, Inc., himself testified that nothing "of substance" was changed as a result of the merger. I think the ease with which this corporate change was made in 1960 strongly indicates that the Deering Milliken complex in 1956 at the time of Darlington's dissolution was a single employer in which "corporate forms [were] largely paper arrangements that [did] not reflect the business realities." NLRB v. Deena Artware, Inc., 361 U.S. 398, 403 (1960). The critical question becomes, therefore, did the Board have substantial evidence upon which to base its conclusion that there was a degree of common control and ownership existing in this unified industrial complex to warrant finding a single employer?

1916

As pointed out in the majority opinion, Deering Milliken's capital stock was owned in majority amount by the members of the Milliken family. In addition they owned controlling stock in Darlington and in all of the other manufacturing corporations. These mill corporations, in turn, owned all the shares of Deering Milliken Service Corporation, and, along with Deering Milliken & Co., Inc., all the shares in Deering Milliken Research Corporation. The stock ownership was used by the Milliken family to place members of the Milliken family in the position of corporate officers and board directors of the various corporations. Roger Milliken was President of Deering Milliken and President also of all the manufacturing corporations except Laurens (where he was Vice President and on the Board of Directors). A majority of the directors of all the manufacturing corporations except one (Hartsville) were members of the Milliken family. Deering Milliken doesn't seriously deny that the Milliken family's stock ownership permitted the family, and more specifically Roger Milliken, to exercise dominion and control over all phases of business and labor relations at each mill and over each and every corporate entity in the entire complex, but rather, it strongly denies that such control was actually exercised.

The Board found that through majority stock ownership and interlocking directories, the Milliken family (especially in the person of Roger Milliken) was able to and did exercise actual control in the area of labor relations. As stated by the Board:

1917 "Roger Milliken, the president of all of the corporations save one, exercised ultimate control over the labor relations of all of the corporations. Thus he received reports from each of the mills as to progress in reducing the number of jobs, the pay raises given, hours worked and job assignments, was asked for approval of various personnel actions, and made suggestions as to the hiring of personnel. More important, however, was Roger Milliken's participation in the area having the greatest impact on labor relations—the area of collective bargaining. Thus he circulated a memorandum and editorial which was obviously intended as a primer for the managers of the mills in combating union organization. During the organizational campaign his pervasive influence was demonstrated by the statements of supervisory employees that Roger Milliken would close the plant rather than permit its unionization."

The Board does not suggest that Roger Milliken actually engaged in the day to day direction of labor relations at each of the plants. The day to day details inevitably had to be left to the resident chief executive officers, the Mill Treasurers. Everything other than over-all direction and guidance as to company policy of labor relations would, of necessity, have to be exercised by subordinates. Indeed it seems remarkable that Roger Milliken had the time, in view of his far flung interests and responsibilities, to keep informed about labor relations in the individual mills and to make the detailed suggestions as to many facets of labor relations that the record reveals he did. The record is replete with suggestions and recommendations by Roger Milliken to the Mill Treasurers on ways to

1918 improve production and reduce jobs. For instance, Roger Milliken on different occasions proposed that each piece of machinery be tagged with its cost to discourage misuse, that closed circuit television be utilized to eliminate certain jobs, that machinery be rearranged to reduce the operator's walking distance, that the time which employees spent smoking be limited, and that beverage dispensing machines for employee use be installed. These suggestions were usually made in reference to "our" mills. These and other suggestions were not always followed, but they unmistakably indicate that Roger Milliken kept himself constantly informed as to what was occurring and didn't hesitate to suggest improvements.

Proof of Roger Milliken's ultimate and uncontradicted control over major policies affecting labor relations illustrated by his decision, with approval of his family, to close the Darlington plant because of the employees' decision to be represented by a union.

After the union had won the Board supervised election of September 6, 1956, Darlington Mill Treasurer Oeland and Darlington attorney Poag telephoned Roger Milliken to advise him of the union's victory. One day later, Roger Milliken decided to close down the mill. Roger Milliken informed three members of his family, who were on the Darlington Board of Directors, of his intention to close the mill, he did not inform Mill Treasurer Oeland. On September 12, the Board met and unanimously passed a resolution to close the mill. This resolution to close the mill. This resolution was acted upon at a shareholders' meeting of October 17 and passed by a large majority, with only a few shareholders who were residents of the Town of Darlington voting against liquidation. Immediately after the shareholders' meeting, Roger Milliken
1919 was informed by South Carolina State Senator Mozingo, a resident of the Town of Darlington, that 83% of the mill employees had signed a petition to go back to work. Roger Milliken's reply was: "As long as there are 17% of the hard core crowd here, I refuse to run the mill".

Thus I find in the record overwhelming evidence to support the Board's holding:

> "[W]e conclude that Deering Milliken, primarily through the person of Roger Milliken, exercised control over the labor relations of all the corporations, including Darlington. Although the details of day-to-day personnel relations may have been, of necessity, conducted at the mills, it is manifest that the major decisions were exclusively in the hands of Roger Milliken. Under such circumstances it is clear that Deering-Milliken must assume responsibility for control of Darlington's labor relations."

Deering Milliken's brief contends that the Board had no basis to find that Roger Milliken was not acting solely in his capacity as President of Darlington Mills. The evidence, however, points to the fact that Roger Milliken retained ultimate control over the whole Milliken complex and acted as its chief executive officer, without delineating his various ca-

pacities. The Darlington Mill was but a small unit in a vast industrial empire employing more than 19,000 persons owned and controlled directly or indirectly by the Milliken family. Its closure was intended to be and was a grim deterrent to the thousands of employees in the affiliated plants who might entertain similar notions of unionization. Such con-
1920 duct was properly considered by the Board to fasten responsibilities of his actions for unfair labor practices upon the entire complex.

Closing Mill Unfair Labor Practice

Having found that the Board had ample evidence to conclude that the Milliken complex was a single employer under the NLRA, the next question to consider is whether under the decided cases, the act of Deering Milliken in shutting down the Darlington plant was an unfair labor practice, cognizable under Section 8(a)(3).

That the plant closure was the direct result of the organizational activities of the employees is too well documented by the record to require extended discussion. Roger Milliken himself gave that reason to his stockholders for his decision to close the mill. On approximately thirty separate occasions, supervisory personnel threatened the employees with closure in case the union won, and attributed their prophesies to Roger Milliken's well publicized hostility to unions. Milliken himself circulated to all of his mills a trade magazine article pointing out that his attitude was so well known that liquidation was inevitable from the minute the election result was announced. Darlington's belated efforts to stress the economic factors are belied by the prior history of the mill. In the nine months prior to the election, management had spent $400,000.00 in a modernization program which included not only new machinery but additions to plant structure. A belief that union wage demands and bargaining attitudes towards work loads may make future operations unprofitable does not constitute an economic reason which would excuse the respondent's conduct in this case. The Board found upon
1921 abundant evidence that the respondent's conduct was discriminatorily motivated.

"Conduct which on its face appears to serve legitimate business ends in these cases is wholly impeached by the showing of an intent to encroach on protected rights.

> The employer's claim of legitimacy is thereby totally dispelled [Citing cases].
>
> "* * * 'The ultimate problem is the balancing of conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review. Labor Board v. Truck Drivers Union, 353 U.S. 87, 96'." National Labor Relations Board v. Erie Resistor Corporation, et al. 31 U.S.L.W. 4407, 4409, 4411 (U.S. May 13, 1963).

This court has held, in unison with other Circuits, that an employer may neither temporarily shut down operations to avoid bargaining with a union, *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (4 Cir. 1953), nor may he subcontract out work to another employer formerly done by a division in his business for that purpose, *NLRB* v. *Preston Feed Corp.*, 309 F. 2d 346 (4 Cir. 1962). Moreover, other Courts of Appeals have held that an employer may not transfer work to another plant owned, directly or indirectly by the employer himself, to avoid bargaining. See e.g., *NLRB* v. *United States Air Conditioning Corp.*, 302 F. 2d 280 (1 Cir. 1962); *NLRB* v. *Winchester Electronics, Inc.*, 295 F. 2d 288 (2 Cir. 1961); *NLRB* v. *Lexington Electric Products Co.*, 283 F. 2d 54 (3 Cir. 1960); 1922 *cert. denied*, 365 U.S. 845 (1961); *Butler Bros. v. NLRB*, 134 F. 2d 981 (7 Cir. 1943). I fail to see any distinction in principle between such conduct and that of the Respondent here.

More to the point, I consider the decision of this court in *NLRB* v. *Preston Feed Corporation*, 309 F. 2d 346 (4 Cir. 1962) as controlling on the legal issue here. In that case the Board sought enforcement of its order requiring the employer to reinstate its trucking operations which the Board found had been closed down in order to discourage unionization among its employees. This court enforced the order, pointing out that although the employer had decided for valid economic reasons to close the operation in the future, its sudden and precipitate closure was to discourage unionization and, therefore, constituted an unfair labor practice which could be remedied by requiring reopening until the employer could vindicate its closing for economic reasons. Judge Soper, speak-

ing for a unanimous court, recognized the employer's right to close for valid economic reasons:

> "The question has been considered in a number of cases in which the Board, in order to effectuate the purposes of the Act, has thought it desirable to require an employer to continue a certain business operation or department which he desired to abandon. In these cases it has been uniformly held that the Board is without power to interfere with management *where the discontinuance of a part of the business is prompted by legitimate business motives and not in order to frustrate the purposes of the Act or interfere with employees in*
> 1923 *the exercise of rights conferred upon them by the statute.* (Citing cases) [Emphasis added.].
>
> "In the instant case, as we have seen, the initial decision of the Company to close its trucking department was based on economic reasons and not on hostility to the union, but the immediate decision and the prompt closing of the department on March 6th, when it was discovered that the employees led by the union were insisting upon their rights under the statute, was impelled by the intent to restrain the employees in their rights to collective bargaining. We shall, accordingly, enter a decree that the order of the Board in these and other particulars be enforced. * * *" 309 F. 2d 352.

It is apparent that the Board's order in this case is within the rationale of this Court's judgment in the *Preston* case. See also *NLRB* v. *Norma Mining Corp.*, 206 F. 2d 38 (4 Cir. 1953), where this court through Judge Dobie, speaking for a unanimous court, enforced the order of the Board requiring an operating lessee to reopen a mine closed by the employer in violation of Section 8(a)(1) and (3) of the Act.

Again, the Eighth Circuit in *NLRB* v. *Missouri Transit Co.*, 250 F. 2d 261 (8 Cir. 1957) faced a situation closely analogous to the one we have here. The Board's finding of an unfair labor practice and the relief granted by the Board and enforced by the court support the Board in this case. The Missouri Transit Company was a common carrier of passengers by bus for hire engaged in two operations: one a short-line intrastate shuttle bus operation between Waynesville, Missouri, and Fort Leonard Wood, Missouri; the other a long-line inter-
1924 state bus operation between Fort Leonard Wood and

Cedar Rapids, Iowa. As a result of union attempts to organize the shuttle-line bus drivers, the company sold all the equipment used in the operation of the shuttle route to a competitor. This action resulted in the discontinuance by the company of the shuttle-line route and service, and terminated the employment of all shuttle-line bus drivers. Upon the filing of an unfair labor practice against the company, the Board found that the company had disposed of the shuttle-line route and equipment used in operating it, and had discharged the shuttle-line drivers, for discriminatory reasons, in violation of Sections 8(a) (3) and (1) of the Act. In granting affirmative relief, the Board ordered that the company place the discharged drivers on a preferential hiring list for priority consideration for jobs in the long-line operations and that the company pay back wages to these individuals from the date that the shuttle-line bus operations were closed to the date when they were either reinstated or placed on a preferential hiring list.

The company contended that the Board was powerless either to order back pay beyond the time when the shuttle-line bus operation ceased or to order reinstatement in a completely separate and independent division of the company. The Eighth Circuit rejected the Company's contentions and ordered enforcement of the Board's order in full. I think the logic of the *Missouri Transit* case compelling and the application of the principles announced clearly appropriate to case here being considered.

In *NLRB* v. *Wallick*, 198 F. 2d 477 (3 Cir. 1952), that court sustained a Board order requiring a respondent partnership which operated several enterprises engaged in the manu-
1925 facture of ladies' garments to either reopen a plant which it had closed in violation of the Act because its employees had organized or give its employes an opportunity to work in other plants operated by the partnership. This was true even though the closed plant was owned by a separate corporation the stock of which was owned by the individual partners. See also *A. M. Andrews Co., of Oregon* v. *NLRB*, 236 F. 2d 44 (9 Cir. 1956).

In the present case, even absent single-stockholder status, the employees had a remedy. After the Darlington stockholders on October 17, 1956, had adopted the recommendations of the Board of Directors to liquidate the Darlington Mill, employees were discharged in separate groups over the

intervening period until the plant closed on November 24. Yet, pursuant to the laws of South Carolina, the corporation continued to exist for the purpose of liquidating its assets and settling its liabilities. If, as the Board found, amply supported by the record as a whole, these discharges were for discriminatory reasons under Section 8(a)(3), relating to the employees' "tenure of employment", then at a very minimum the amounts realized from the sale of Darlington machinery and equipment should be allocated to reimbursing the discharged employees for lost wages from the time of their discharge until the liquidation of the corporation had been completed. It is obvious that if one or two, or even a majority of employees had been discharged for their activities on behalf of the union, then the court would uphold a Board finding of an 8(a)(3) violation. It seems tortuous logic to say, therefore, that because the company discharged without distinction both the employees who voted against the union (but who were discharged nonetheless because a majority of the employ-
1926 ees elected to be represented by a union), the company is absolved from liability under the Act.

But beyond this remedy I think the Board was justified in ordering Deering Milliken to provide back pay until the discharged employees were able to obtain susbstantially equivalent employment. The record reveals that a large number of Darlington supervisory personnel was absorbed into the Deering Milliken complex. Late in September 1956, the Deering Milliken Industrial Engineering Department sought and obtained from Darlington Mill Treasurer Oeland a list of Darlington Supervisory personnel who might be "useful" to it. All of these men were interviewed by the Department. Plans were made to have all supervisory personnel of the Darlington Mill transferred to the Department's payroll for a three month period after their separation from Darlington. The purpose of this arrangement was to provide a period of time within which these men could be "picked up" by other Deering Milliken Mills. Some of these supervisors were actually picked up, going directly on the payroll of other mills without an interval on the payroll of the Department. Others were transferred to other parts of the Deering Milliken organization. Although some supervisors ceased their affiliation with Deering Milliken entirely, they were given time off, with pay, in which to seek new employment opportunities. One of

these men was Mill Treasurer Oeland, who remained on the Darlington payroll until July, 1957, some seven months after mill machinery and equipment had been sold. In addition, a few supervisors received bonus payments after the Darlington closing in appreciation of their efforts during the union crisis. Thus even though the Deering Milliken complex disclaims any responsibilities after the Darlington closing for
1927 those whom it regards as its enemies, it managed to reward and find places for those whom it regarded as its friends. I see nothing to prevent enforcing the Board's order which would also require Deering Milliken to offer substantially equivalent employment to non-supervisory personnel who were equally adversely affected by the mill's closing.

I am not unmindful of the Board's findings that Darlington committed other violations in addition to the 8(a)(3) here discussed, specifically 8(a)(1) and 8(a)(5). The repeated threats of members of management that the mill would be shut down if the union won the representation election constituted a classic form of interference, restraint, and coercion proscribed by Section 8(a)(1). Section 8(a)(1) was also violated by management threats to blacklist union adherents, their interrogation of employees regarding their union activity, and their support of a petition disavowing the union after the announced intention of Roger Milliken to close the mill upon learning of the union victory.

The Board also found that the failure of the Company to bargain with the union with respect to the tenure of employment of the employees in the Darlington Mill and to furnish the union with wage and related bargaining data constituted an unfair labor practice under Sections 8(a)(5) and (1). I am convinced that the record as a whole amply supports the Board's findings, but do not feel that an extended discussion of these violations is warranted here.

1928 In the United States Court of Appeals for the Fourth Circuit

No. 8790

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., PETITIONERS

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, INTERVENOR

ON PETITION TO REVIEW AND SET ASIDE ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decree—Filed November 19, 1963

THIS CAUSE came on to be heard upon the petition of Darlington Manufacturing Company and Deering Milliken, Inc., to review and set aside an order of the National Labor Relations Board of October 18, 1962, issued against said Darlington Manufacturing Company, Darlington, South Carolina; Deering Milliken and Company, Inc., New York, New York, and Deering Milliken Company, Incorporated, New York, New York, their officers, agents, successors, and assigns, in proceedings before said Board known upon its records as Case No. 11–CA–1292; upon the answer of said Board and cross-petition for enforcement, and upon the certified list in lieu of a transcript of the record; and said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and the same is hereby, set aside.

CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.

HERBERT S. BOREMAN,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

I dissent:

J. SPENCER BELL
United States Circuit Judge.

I concur with the dissent:

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

[File endorsement omitted]

1929 In the United States Court of Appeals for the Fourth Circuit

No. 8790

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, INTERVENOR

ON PETITION TO REVIEW AND SET ASIDE ORDER OF THE NATIONAL LABOR RELATIONS BOARD

No. 8861

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., INTERVENORS

ON PETITION TO REVIEW AND MODIFY A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

No. 8906

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

DEERING, MILLIKEN AND COMPANY, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Order Amending Opinion—December 9, 1963

For reasons appearing to the court,

It is ordered that the sentence inserted at the end of the paragraph ending on page 9 of the typewritten opinion reading "It is noteworthy that Darlington was the only Milliken related plant manufacturing print cloth, and since its
1930 liquidation none of the remaining mills has undertaken

the manufacture of that kind of product.", be, and it is hereby, deleted.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.
CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.
HERBERT S. BOREMAN,
United States Circuit Judge.
ALBERT V. BRYAN,
United States Circuit Judge.
J. SPENCER BELL,
United States Circuit Judge.

[File endorsement omitted]

1931 [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia Circuit

September Term, 1962

No. 17335

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Before: PRETTYMAN, Senior Circuit Judge, and WILBUR K. MILLER, Circuit Judge, and BELL, Circuit Judge of the Fourth Circuit, sitting by designation, in Chambers.

Order—December 17, 1962

On consideration of the motion of Darlington Manufacturing Company, and Deering Milliken, Inc., for leave to intervene specially and to file motion to transfer proceedings, and of said movants' motion for leave to file reply to the lodged opposition to the motion to transfer, and it appearing that no objections thereto have been filed, it is

ORDERED by the court that the aforesaid motions be granted, and that Darlington Manufacturing Company, and Deering Milliken, Inc., are hereby allowed to intervene specially in this case and to file motion to transfer, and the Clerk is hereby directed to file herein intervenors' motion to transfer proceedings.

petitioner's opposition thereto, and intervenors' reply, and upon consideration whereof, and of respondent's response to the motion to transfer, and it appearing that for "the convenience of the parties in the interest of justice" this case should be transferred to the United States Court of Appeals for the Fourth Circuit, it is

FURTHER ORDERED by the court, pursuant to Sec. 21126) of Title 28, United States Code, that this proceeding is hereby transferred to the United States Court of Appeals for the Fourth Circuit, and it is

FURTHER ORDERED by the court that the Clerk forthwith certify and transfer to the United States Court of Appeals for the Fourth Circuit all of the original papers filed by the parties in this case together with copies of the docket entries, and orders of this court entered in this case.

Dated: December 17, 1962. Per Curiam.

1932 [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia Circuit

No. 17335

Appearance—Filed October 29, 1962

TEXTILE WORKERS UNION OF AMERICA

vs.

NATIONAL LABOR RELATIONS BOARD

The Clerk will enter my appearance as Counsel for the Intervener: (Name) Percy H. Russell; (Phone) ST 3-3200; (P.O. Address) 800 World Center Bldg.; (Zone) 6.

Note.—Must be signed by a member of the Bar of the United States Court of Appeals for the District of Columbia Circuit. Individual and not firm names must be signed.

1933 [File endorsement omitted]

In the United States Court of Appeals for the District of Columbia

No. 17335

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition to Review and Modify a Decision and Order of the National Labor Relations Board—Filed October 18, 1962

Textile Workers Union of America, AFL–CIO (hereinafter also referred to as the "Union"), respectively petitions this Honorable Court to review and modify, as hereinafter set forth, a decision and order of the National Labor Relations Board entered on Oct. 18, 1962 in a proceeding entitled "Darlington Manufacturing Company, Roger Milliken, Deering, Milliken & Co., Inc. and Textile Workers Union of America, AFL–CIO, Case No. 11–CA–1071."

This petition is filed pursuant to Section 10(f) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 160(f).

1934 I

THE NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

The proceeding as to which review is here sought is a proceeding under Section 10(b) of the Labor-Management Relations Act, 1947, 29 U.S.C. Section 160(b). The proceeding was initiated by charges and amended charges filed by the Textile Workers Union of America, AFL–CIO, against the Darlington Manufacturing Company, Roger Milliken, President, and Deering, Milliken & Co., Inc. (hereinafter also referred to as the "Employers").

The charges and amended charges alleged that the Employers had violated Sections 8(a) (1), (3), and (5) of the Act. Ultimately the General Counsel of the National Labor Relations Board issued complaints against the Employers which were based on the aforesaid charges.

The complaints alleged, in sum, that: the Union had conducted an organizing campaign among the Employer's work-

ers during 1956; that during the campaign the Employer's agents had conducted certain acts of coercion, surveillance and interrogation directed toward their pro-union employees; that as a result of the organizing campaign, the Union won
1935 a National Labor Relations Board representation election covering the employees at the Darlington, South Carolina plant of the Employers; within a short while after the election, the Employers shut down and liquidated the Darlington plant in order to avoid bargaining with the Union and to discriminate against the employees who had voted for the Union; and that as a result of this pattern of conduct, the Employers had violated Section 8(a) (1), (3), and (5) of the Act.

After extensive proceedings, the National Labor Relations Board issued a decision and order which the Union now brings before this Court. That decision and order, in sum, found that the Employers had generally committed the violations alleged. It also ordered them to take certain remedial action. However, the decision and order failed to order the Employers to recommence operations or to adequately reinstate its employees.

II

VENUE

The Union is a "person aggrieved" by the final order of the Board herein, and brings this petition for review in this Court under Section 10(f) of the National Labor Relations Act, 29 U.S.C. Section 160(f).

1936 III

GROUNDS FOR RELIEF

As grounds for relief herein, the Union asserts that the Board's decision and order provided an inadequate remedy for the unfair labor practices alleged and found.

IV

RELIEF REQUESTED

Petitioner prays for a review of the decision and order of the National Labor Relations Board and that:

(1) A copy of this Petition be served upon the National Labor Relations Board;

(2) This Court direct the Board to modify its decision and order in order to give more effective relief to the employees involved; and

(3) Petitioner be given such other relief as the Court may deem proper.

Respectfully submitted,

DAVID E. FELLER,
Feller, Bredhoff & Anker,
1001 Connecticut Ave., N.W.,
Washington 6, D.C.
BENJAMIN WYLE,
PATRICIA EAMES,
99 University Place,
New York 3, New York,
Attorneys for Petitioners.
By DAVID E. FELLER.

Dated: October 18, 1962

1937 [File endorsement omitted]

In the United States Court of Appeals for the Fourth Circuit

No. 8861

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., INTERVENORS

Answer of the National Labor Relations Board to Petition for Review of its Order—Filed January 25, 1963

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq., as amended by 73 Stat. 519), files this Answer to the Petition for Review filed in this proceeding:

1. The Board admits the allegations contained in Section II of the Petition for Review.

2. With respect to the allegations contained in Section I of the Petition for Review, the Board prays reference to the certi-

fied transcript of record for a full and exact statement of the proceedings before the Board, of the pleadings and evidence, of the Board's findings of fact, conclusions of law, and order, and of all other proceedings had in this matter.

3. The Board denies each and every allegation of error contained in Section III of the Petition for Review.

4. The Board requests that the prayer for relief contained in Section IV of the Petition for Review be denied.

1938 5. Pursuant to Section 10(f) of the Act; Rule 27(7) of this Court; and an order issued by the Court of Appeals for the District of Columbia Circuit on December 17, 1962, transferring this cause (previously docketed by that Court as No. 17335) to this Court, the Board will file with this Court a certified list of all documents, transcripts of testimony, exhibits, and other material comprising the entire record of the proceedings before the Board.

WHEREFORE, the Board prays that this Court cause notice of the filing of the Answer to be served on the petitioner and that this Court enter a decree denying the Petition for Review.

(S) Marcel Mallet-Prevost
MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D.C., this day of January 23, 1963.

1939 [File endorsement omitted]

In the United States Court of Appeals for the Fourth Circuit

No. 8861

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Amended Petition To Review and Modify a Decision and Order of the National Labor Relations Board—Filed February 5, 1963

Textile Workers Union of America, AFL-CIO (hereinafter also referred to as the "Union"), respectfully petitions this Honorable Court to review and modify, as hereinafter set forth, a decision and order of the National Labor Relations

Board entered on October 18, 1962, in a proceeding entitled "Darlington Manufacturing Company, Roger Milliken, Deering, Milliken & Co., Inc. and Textile Workers Union of America, AFL–CIO, Case No. 11–CA–1071.

This petition is filed pursuant to Section 10(f) of the Labor-Management Relations Act, 1947, 29 U.S.C. Section 160(f).

I

The Nature of the Proceedings as to Which Review Is Sought

The proceeding as to which review is here sought is a proceeding under Section 10(b) of the Labor-Management Relations Act, 1947, 29 U.S.C. Section 160(b). The proceeding was initiated by charges and amended charges filed by the Textile Workers Union of America, AFL–CIO, against the Darlington Manufacturing Company, Roger Milliken, President, and Deering, Milliken & Co., Inc. (hereinafter also referred to as the "Employer").

1940 The charges and amended charges alleged that the Employer had violated Sections 8(a) (1), (3), and (5) of the Act. Ultimately the General Counsel of the National Labor Relations Board issued complaints against the Employer which were based on the aforesaid charges.

The complaints alleged, in sum, that: the Union had conducted an organizing campaign among the Employer's workers during 1956; that during the campaign the Employer's agents had conducted certain acts of coercion, surveillance and interrogation directed toward their pro-union employees; that as a result of the organizing campaign, the Union won a National Labor Relations Board representation election covering the employees at the Darlington, South Carolina plant of the Employer; within a short while after the election, the Employer shut down and liquidated the Darlington plant in order to avoid bargaining with the Union and to discriminate against the employees who had voted for the Union; and that as a result of this pattern of conduct, the Employer had violated Section 8(a) (1), (3) and (5) of the Act.

After extensive proceedings, the National Labor Relations Board issued a decision and order which the Union now brings before this Court. That decision and order, in sum, found that

Darlington Manufacturing Company and Deering, Milliken & Co., Inc. had generally committed the violations alleged. It also ordered them to take certain remedial action. However, the decision and order failed to order Darlington Manufacturing Company and Deering, Milliken & Co., Inc. to recommence operations or to adequately reinstate its employees. Moreover, the decision and order failed to find that Roger Milliken had committed the violations alleged.

II

VENUE

The Union is a "person aggrieved" by the final order of the Board herein, and brings this petition for review in this Court under Section 10(f) of the National Labor Relations Act, 29 U.S.C. Section 160(f).

1941

III

GROUNDS FOR RELIEF

As grounds for relief herein, the Union asserts that the Board's decision and order provided an inadequate remedy for the unfair labor practices alleged and found, and that the order errs in not finding Roger Milliken liable for the violations.

IV

RELIEF REQUESTED

Petitioner prays for a review of the decision and order of the National Labor Relations Board and that:

(1) A copy of this Petition be served upon the National Labor Relations Board;

(2) This Court direct the Board to modify its decision and order an order to give more effective relief to the employees involved, and to hold Roger Milliken liable for the unfair labor practices committed.

(3) Petitioner be given such other relief as the Court may deem proper.

Respectfully submitted,

DAVID E. FELLER,
Feller, Bredhoff & Anker,
1001 Connecticut Ave., N.W.,
Washington 6, D.C.
BENJAMIN WYLE,
PATRICIA EAMES,
99 University Place,
New York 3, New York,
Attorneys for Petitioners.
By: DAVID E. FELLER.

Dated: February 4, 1963.

1942 [File endorsement omitted]

In the United States Court of Appeals for the Fourth Circuit

No. 8861

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., INTERVENORS

Answer of the National Labor Relations Board to Amended Petition for Review of its Order—Filed February 15, 1963

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq., as amended by 73 Stat. 519), files this Answer to the Amended Petition for Review filed in this proceeding:

1. The Board admits the allegations contained in Section II of the Amended Petition for Review.

2. With respect to the allegations contained in Section I of the Amended Petition for Review, the Board prays reference to

the certified transcript of record for a full and exact statement of the proceedings before the Board, of the pleadings and evidence, of the Board's findings of fact, conclusions of law, and order, and of all other proceedings had in this matter.

3. The Board denies each and every allegation of error contained in Section III of the Amended Petition for Review.

4. The Board requests that the prayer for relief contained in Section IV of the Amended Petition for Review be denied.

1943 5. Pursuant to Section 10(f) of the Act; Rule 27(7) of this Court; and an order issued by the Court of Appeals for the District of Columbia Circuit on December 17, 1962, transferring this cause (previously docketed by that Court as No. 17335) to this Court, the Board has filed with this Court a certified list of all documents, transcripts of testimony, exhibits, and other material comprising the entire record of the proceedings before the Board.

WHEREFORE, the Board prays that this Court cause notice of the filing of the Answer to be served on the petitioner and that this Court enter a decree denying the Amended Petition for Review.

(S) Marcel Mallet-Prevost
MARCEL MALLET-PREVOST
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D.C. this 14th day of February, 1963.

1944 In the United States Court of Appeals for the Fourth Circuit

No. 8861

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONER

versus

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., INTERVENORS

ON PETITION TO REVIEW AND MODIFY A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

Decree—Filed November 19, 1963

THIS CAUSE came on to be heard upon the petition of Textile Workers Union of America, AFL–CIO, to review and

modify a decision and order of the National Labor Relations Board entered on October 18, 1962, in a proceeding entitled Darlington Manufacturing Company, Roger Milliken, Deering, Milliken & Co., Inc., and Textile Workers Union of America, AFL–CIO, known upon the Board's records as Case No. 11–CA–1292; upon the certified list in lieu of a transcript of the record; the answer of the respondent; the amended petition to review, and the answer of the National Labor Relations Board to the amended petition to review, and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said petition be, and the same is hereby, denied.

CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.
HERBERT S. BOREMAN,
United States Circuit Judge.
ALBERT V. BRYAN,
United States Circuit Judge.

I dissent:

J. SPENCER BELL,
United States Circuit Judge.

I concur with the dissent:

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

[File endorsement omitted]

1945 [File endorsement omitted]

In the United States Court of Appeals for the Fourth Circuit

No. 8906

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DEERING, MILLIKEN AND COMPANY, INC., RESPONDENT

Petition for Enforcement of an Order of the National Labor Relations Board—Filed January 25, 1963

To the Honorable, the JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136. U.S.C.,

Secs. 151 *et seq.*, as amended by 73 Stat. 519), respectfully petitions this Court for the enforcement of its order against Respondent Deering, Milliken and Company, Inc., its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as Case No. 11–CA–1071.

In support of this petition the Board respectfully shows:

(1) Upon proceedings had before the Board in said matter, the Board on October 18, 1962, duly stated its findings of fact and conclusions of law, and issued an order directed to Respondents, Darlington Manufacturing Company, Deering, Milliken and Company, Inc., and Deering, Milliken, Incorporated, their officers, agents, successors, and assigns. The Board's Decision and Order was served on Respondents by sending a copy thereof, bearing Government frank, by registered mail, to Respondents' counsel.

(2) Pursuant to Section 10(f) of the Act, Textile Workers Union of America, AFL–CIO, the charging party in the Board proceeding, filed with this Court a petition to review the Board's Decision and Order. Said Petition appears on the docket of the Court as *No. 8861, Textile Workers Union of America*, v. *N.L.R.B.* The Board is filing an answer to said petition. Darlington Manufacturing Company and
1946 Deering Milliken, Inc., two of the respondents in the Board proceedings, also filed a petition to review the Board's Decision and Order. Said petition appears on the docket of this Court as *No. 8790, Darlington Manufacturing Company and Deering Miliken, Inc.*, v. *N.L.R.B.* The Board is filing an answer to said petition and cross-petition for enforcement of its order.

(3) In accordance with said petitions to review, and pursuant to Rule 27(7) of this Court, the Board is filing a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said order was entered, which includes pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board. This same certified also constitutes the certified record in the instant proceeding.

(4) Respondent is engaged in business in the State of South Carolina, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition to be served upon Respondent, and that this Court take jurisdiction of the proceeding and of all the questions determined therein, and make and enter upon the pleadings, the testimony and evidence, and the proceeding set forth in the transcript, and upon the order made thereupon, a decree enforcing the Board's order and requiring Respondent, its officers, agents, successors, and assigns to comply therewith.

(S) Marcel Mallet-Prevost
MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

January 23, 1963.

1947 In the United States Court of Appeals for the Fourth Circuit

No. 8790.

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., PETITIONERS

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, INTERVENOR

No. 8861

TEXTILE WORKERS UNION OF AMERICA, AFL–CIO, PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

DARLINGTON MANUFACTURING COMPANY AND DEERING MILLIKEN, INC., INTERVENORS

No. 8906

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

DEERING MILLIKEN AND COMPANY, INC., RESPONDENT

Order consolidating cases—January 30, 1963

On motion of the National Labor Relations Board for consolidation of the above-entitled causes for the purposes of

joint appendix, briefs, and oral argument, and for cause shown.

It is ordered that the above-entitled causes be, and they are hereby, consolidated for the purposes of joint appendix, briefs, and oral argument.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

JANUARY 30, 1963.

[File endorsement omitted]

1948 In the United States Court of Appeals for the Fourth Circuit

No. 8906

NATIONAL LABOR RELATIONS BOARD, PETITIONER

against

DEERING, MILLIKEN AND COMPANY, INC., RESPONDENT

Answer to Petition for Enforcement of an Order of the National Labor Relations Board—Filed February 15, 1963

Deering Milliken, Inc. files this answer to the Petition for Enforcement filed in the above-numbered proceeding by the National Labor Relations Board ("the Board") and alleges to the Court as follows:

1. Respondent admits the allegations contained in paragraph (1) of the Petition except that respondent denies that the order of the Board was "directed to" Deering, Milliken and Company, Inc., for the reason that the corporation of that name is no longer in existence; and Deering Milliken, Inc., alleges that it is the successor to Deering, Milliken and Company, Inc., and that a cross-petition by petitioner National Labor Relations Board to enforce said order against Deering Milliken, Inc. now appears on the docket of this Court as No. 8790.

1949 Darlington Manufacturing Company and Deering Milliken, Inc. v. N.L.R.B. The pertinent facts with respect to the status of petitioner, Deering Milliken, Inc. as the successor to Deering Milliken and Company, Inc. are set forth in the opinion of this Court in Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (1961).

2. Deering Milliken, Inc. denies the allegation of paragraph (4) of Petition for Enforcement that respondent Deering Milliken and Company, Inc. is or was engaged in business in the State of South Carolina.

WHEREFORE, Deering Milliken, Inc. prays that the petition herein be dismissed and that this Court enter an order denying said petition.

Dated: New York, New York, February 14, 1963.

TOWNLEY, UPDIKE, CARTER & RODGERS

By: JOHN R. SCHOEMER, JR.,

A Member of the Firm, Attorneys for Deering Milliken, Inc., 220 East 42nd Street, New York 17, New York.

1950 [File endorsement omitted]

In the United States Court of Appeals for the Fourth Circuit

No. 8906

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DEERING, MILLIKEN AND COMPANY, RESPONDENT

Response to Answer to Petition for Enforcement of an Order of the National Labor Relations Board—Filed February 28, 1963

On October 18, 1962, the Board issued an order against, *inter alia*, Deering, Milliken and Company, Inc., a New York corporation herein called Deering Milliken (New York), and Deering Milliken, Inc., a Delaware corporation herein called Deering Milliken (Delaware). On the same day, Deering Milliken (Delaware), *inter alia*, filed a petition with this Court to review and set aside that order (No. 8790, *Darlington Manufacturing Company and Deering Milliken, Inc.* v. *N.L.R.B.*). On January 25, 1963, the Board filed a cross-petition seeking enforcement of its order against Deering Milliken (Delaware), *inter alia*, and also filed its petition in the subject case, seeking enforcement of its order against Deering Milliken (New York). Deering Milliken (New York) has not filed an answer to the instant petition for enforcement. However, Deering Milliken (Delaware) has filed an answer to that petition, in which it apparently seeks dismissal of that petition. The Board opposes dismissal of that petition for the following reasons:

1. On January 25, 1963, the Board filed a motion with this Court seeking consolidation of No. 8790 (the review proceeding initiated by Deering Milliken (Delaware)) with the instant

enforcement proceeding against Deering Milliken (New
1951 York). No opposition was filed to this motion, although it was duly served upon Deering Milliken (Delaware), and on January 30, 1963 this Court granted the motion. Moreover, no contention is made that the propriety of the instant enforcement petition is affected by any events after the consolidation order. Under these circumstances, we believe that the request for dismissal comes too late.

2. Deering Milliken (Delaware) contends that because Deering Milliken (New York) has merged into Cotwool Manufacturing Corporation, a Delaware corporation which thereafter assumed the name of Deering Milliken (Delaware), Deering Milliken (New York) is "no longer in existence" and Deering Milliken (Delaware) is its "successor." We submit that this is not a sufficient basis for dismissal of the petition against Deering Milliken (New York). Deering Milliken (Delaware)'s concession that it is Deering Milliken (New York)'s successor does not establish beyond peradventure that its legal liabilities under the terms of the Board's order and its power to discharge them can in no respect be less than those of Deering Milliken (New York). See *N.L.R.B.* v. *Regal Knitwear*, 324 U.S. 9. In fact, Deering Milliken (Delaware)'s action in asking dismissal of the petition against Deering Milliken (New York) suggests that it believes its own liabilities might be enlarged by an order issued against its predecessor as well as against itself. On the other hand, no party could be prejudiced by this Court's action in retaining the proceeding against Deering Milliken (New York) on its docket for disposition together with the other cases with which it has been consolidated. Moreover, because the merger took place after the initiation of the unfair labor practice proceeding against Deering Milliken
(New York), both the relevant State statutes [1] and Rule
1952 25(c) of the Federal Rules of Civil Procedure permit the continuation of this proceeding against that corporation.

3. Deering Milliken (Delaware)'s contention that Deering Milliken (New York) never did business in South Carolina is an allegation going to the merits of the Board's order and not to the venue of this proceeding. A basis for the Board's order

[1] See Section 281 of the Delaware Corporation Law (Title 8), 48 L. Del. 1951, Ch. 353; McKinney's Consolidated Laws of New York, Article 8, Secs. 90 and 91 (the revisions in the pocket part were effected after the instant merger, but in any event do not alter the law in any respect material here).

against Deering Milliken (New York) is its finding (disputed by Deering Milliken (Delaware)) that Deering Milliken (New York) occupies a single-employer status with Darlington Manufacturing Company, which admittedly did business in South Carolina.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the instant petition for enforcement should not be dismissed.

(S) Marcel Mallet-Prevost
MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

1953 In the United States Court of Appeals for the Fourth Circuit

No. 8906

NATIONAL LABOR RELATIONS BOARD, PETITIONER

versus

DEERING, MILLIKEN AND COMPANY, INC., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Decree—Filed November 19, 1963

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Deering, Milliken and Company, Inc., its officers, agents, successors, and assigns on the 18th day of October, 1962, in a proceeding before said Board known upon its records as Case No. 11–CA–1071; upon the certified list in lieu of a transcript of the record; the answer of the respondent; the response of the National Labor Relations Board to the answer to petition for enforcement; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth

Circuit, that the said petition for enforcement be, and the same is hereby, denied.

CLEMENT F. HAYNSWORTH, Jr.,
United States Circuit Judge.
HERBERT S. BOREMAN,
United States Circuit Judge.
ALBERT V. BRYAN,
United States Circuit Judge.

I dissent:

J. SPENCER BELL,
United States Circuit Judge.

I concur with the dissent:

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

1954 [Clerk's Certificate to foregoing transcript omitted in printing]

1955 Supreme Court of the United States

October Term, 1963

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

DARLINGTON MANUFACTURING COMPANY; DEERING MILLIKEN, INC.; DEERING MILLIKEN AND COMPANY; AND TEXTILE WORKERS UNION OF AMERICA, AFL–CIO.

Order Extending Time To File Petition for Writ of Certiorari—February 13, 1964

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 28th, 1964.

EARL WARREN,
Chief Justice of the United States.

Dated this 13th day of February, 1964.

1956 Supreme Court of the United States

October Term, 1963

No. 846

TEXTILE WORKERS UNION OF AMERICA, PETITIONER

vs.

DARLINGTON MANUFACTURING COMPANY, ET AL.

Order allowing certiorari—April 20, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is consolidated with No. 874 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stewart and Mr. Justice Goldberg took no part in the consideration or decision of this petition.

1957 Supreme Court of the United States

October Term, 1963

No. 874

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

DARLINGTON MANUFACTURING COMPANY, ET AL.

Order allowing certiorari—April 20, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted. The case is consolidated with No. 846 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stewart and Mr. Justice Goldberg took no part in the consideration or decision of this petition.

U. S. GOVERNMENT PRINTING OFFICE: 1964